UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT HAMILTON	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:98 CV 1719 ERW DDN
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court upon the petition of Robert Hamilton for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition under 28 U.S.C. § 636(b).

On September 8, 1995, petitioner was convicted in the Circuit Court of the City of St. Louis of murder in the first degree, forcible rape, burglary in the first degree, and stealing under $150.00. Resp. Exh. B at 229. He was sentenced to life imprisonment without the possibility of parole for the murder, life imprisonment for the forcible rape, 15 years imprisonment for the burglary, and one year imprisonment for the stealing, all to be served concurrently. Resp. Exh. B at 245-49. Petitioner appealed his conviction. The Missouri Court of Appeals affirmed the conviction on December 16, 1997. State v. Hamilton, 957 S.W.2d 488 (Mo. App. 1997) (per curiam) (Resp. Exh. E). In his habeas petition filed on November 6, 1998, petitioner admits that he did not file a motion for post-conviction relief pursuant to Mo. Sup. Ct. R. 29.15. (Doc. No. 4).

From his original petition and "Petitioner's Response to Respondents' [Response] To Order to Show Cause Why a Writ of Habeas Corpus Should Not be Granted," filed on March 8, 2001 (Doc. No. 11), the court discerns petitioner's federal habeas corpus claims to be as follows:

1. There was insufficient evidence to prove beyond a reasonable doubt that he was the source of the DNA found at the crime scene, resulting in the denial of due process of law.

2. There was insufficient evidence to prove beyond a reasonable doubt that he caused the victim's death and that he did so after deliberation, resulting in a denial of due process of law.

3. The trial court erred in admitting the DNA evidence because the state failed to establish a chain of custody.

4. Petitioner's incarceration in the Missouri Department of Corrections rather than at a county jail on his sentence of 1 year imprisonment for stealing, a misdemeanor, is in violation of the Missouri Constitution, the United States Constitution, and Mo. Rev. Stat. § 558.011.3(2).

5. Trial counsel was ineffective in failing to object at trial to the reception of the DNA evidence as a chain of custody had not been established by the state.

The evidence offered at trial and described in respondent's brief on direct appeal was as follows:

> On April 6, 1991 at approximately 4 pm, Police Officer Ernest Greenlee responded to an assignment at Marshall Apartments, 4011 Delmar in the City of St. Louis. When he arrived, he was directed to the apartment 510 which belonged to the victim, Alma Irving. Ms. Irving was eighty-five years old. Officer Greenlee entered the victim's apartment and went to the bedroom where he observed the victim lying on her bed and that the bedroom was in disarray. By the time he arrived, EMS personnel were already attempting to revive Ms. Irving. Jennifer Blomefield, an emergency medical technician with the city of St. Louis, testified that on April 6, 1991 she responded to a call at 4011 Delmar in the City of St. Louis. Upon arriving at the victim's apartment, Ms. Blomefield walked into the bedroom and found Ms. Irving on the bed, supine. Ms. Blomefield and her partner, Robert Schwartz, pronounced Ms. Irving dead. Ms. Blomefield also testified that the victim had been dead for at least six hours. When Ms. Blomefield examined the victim's body she observed that the victim had been badly beaten with scratches on her neck bilaterally, bruising, and swelling around the eyes.
>
> James Rowe of Glenn Livery delivered Ms. Irving's body to the Medical Examiner's Office. Rosa Psara, a

chief investigator for the Medical Examiner's Office, testified that she thought that the victim's death looked very suspicious. Ms. Psara also observed the bruising of the victim's neck as well as, hemorrhages around her eyes and a lot of blood around the genital region. Ms. Psara testified that the hemorrhages around the eyes were an indication of an asphyxia related death. Once, Ms. Psara examined the victim's body and made these observations, she called Sergeant Guzy of the homicide division of the St. Louis City Police Department. Sergeant Guzy responded to the morgue and consulted with Ms. Psara. After observing the victim's body, Sergeant Guzy directed a detective crew to 4011 Delmar because the markings he observed on the victim's body led him to believe that the victim had been murdered. As a result of interviews conducted at 4011 Delmar, the police were given the name of a man nicknamed Iceberg who had been seen loitering around the building and who was suspected for having been responsible for some larcenies that occurred at the building.

Ethel Matthews testified that on April 6 she went to visit Ms. Irving and bring her some dinner. As soon as Ms. Matthews arrived at the victim's apartment and observed that the apartment had been "ramshacked." As Ms. Matthews turned around to get help, she immediately saw a man standing close to the victim's door. Ms. Matthews also observed a small television directly in front of this man. Ms. Matthews identified this television as belonging to the victim. Ms. Matthews stated that the man she saw was a man she knew by the nickname, Iceberg.

Gordon Jefferson, who lived in the apartment at the end of the hall from the victim's apartment, testified that on April 6 at approximately 5:30 am, he heard the screen door to the victim's apartment slam. Mr. Jefferson assumed the victim was awake because she normally was up at that hour. At approximately 6:40 am, Mr. Jefferson heard talking in the hallway and he went out into the hallway where he observed a man in the hallway near the victim's apartment talking with another resident of the building, Andre Chaney. Mr. Jefferson testified that he knew this man as Iceberg and then identified [petitioner] as the man that he knew as Iceberg.

Andre Chaney testified that on April 6, at approximately 6:25 am, he went up to the fifth floor to get one of the shopping carts that were normally kept in the hallway. As soon as he got to the fifth floor, Mr.

Chaney observed a man whom he identified as [petitioner] standing near the victim's apartment. Mr. Chaney also observed a small television set and a few black trash bags sitting next to [petitioner]. As Mr. Chaney was leaving the fifth floor, he observed [petitioner] walking down the stairs with the trash bags and the television.

On April 6 at approximately 11:30 am, Mr. Herman Nailor was on his way to visit a friend who lived in the victim's apartment building. Mr. Nailor testified that a man approached him right outside of the apartment building and asked him if he wanted to buy a sewing machine. Mr. Nailor purchased the sewing machine for fifteen dollars. Two days later, as he was reading the paper and noticed an article about the victim's death. When Mr. Nailor saw the name of the victim, he immediately closed up the machine and brought it to the police. The reason he did this is that the victim's name, Alma Irving, was written in the top cover of the sewing machine.

Detective Thomas Wiber was assigned the follow-up investigation of Ms. Irving's death. Detective Wiber contacted Herman Nailor about the sewing machine that Mr. Nailor had turned over to the police. Detective Wiber showed Mr. Nailor photographs of different people including [petitioner]. Mr. Nailor identified [petitioner's] photo as the man who sold him the sewing machine. As a result of the information he received from Mr. Nailor, Detective Wiber conducted a search for [petitioner]. When he found [petitioner], he placed [him] in custody. [Petitioner] was advised of rights per Miranda. When [petitioner] was questioned by the police about the sewing machine, [petitioner] admitted that he had entered the victim's apartment, took the sewing machine from the victim's closet, and observed the victim lying on the bed but [petitioner] said that he left without knowing whether the victim was dead or alive.

Dr. Michael Graham, the Chief Medical Examiner for the City of St. Louis, conducted an examination of the victim's body. Dr. Graham found a number of hemorrhages involving the lining of the eye cavities, bruising on the right collar bone and right arm, bruising at the opening of the vagina as well as within the adjacent third of the vagina, superficial tearing of the lining of the vagina, extensive bruising of the tissues around the vagina and fractures of the hyoid bone and larynx. From his examination, Dr. Graham determined that the cause of death was strangulation. Dr. Graham took samples of the victim's blood, scalp hair, and pubic hair. Dr. Graham

also took samples of the contents of the oral cavity, the vagina and the rectum. These samples were examined by Donna Becherer, a criminalist with the St. Louis City Police Department, intact sperm were found on the vaginal smears and sperm heads were found on the rectal smears. A blood sample and a saliva sample were removed from [petitioner], by Joseph Crow, a criminalist with the St. Louis City Police Department. Ms. Becherer sent all of these samples to Dr. Robert Allen at the Red Cross for DNA testing, specifically the restriction fragment length polymorphism test (commonly known as "RFLP"). After Dr. Allen concluded his testing, the samples were forwarded to the Analytical Genetic Testing Center (hereinafter "AGTC") for further DNA testing, specifically polymerase chain reaction test (commonly known as "PCR").

* * *

From the samples sent to him by Donna Becherer, Dr. Robert Allen conducted an RFLP test comparing the samples received to the two known samples of the victim and [petitioner]. Dr. Allen concluded that the male fraction of the vaginal swabs, recovered from the victim, matches the DNA of [petitioner]. In fact . . . the three different probes showed that the DNA of [petitioner] matched the male fragment of DNA found in the vaginal swabs. Using the product rule, Dr. Allen concluded that the odds were four million to one . . . that the evidentiary DNA profiles in fact were contributed by [petitioner]. Dr. Allen also stated that using the 95% confidence rate and not using the product method the odds would be 1 in 51,000. Dr. Allen further stated that by using the ceiling method, the odds would drop to 1950 to 1.

From the samples sent by Donna Becherer, Howard Verett, Jr., a senior forensic geneticist at AGTC, conducted a PCR test. Mr. Verett concluded that [petitioner] could be the donor of the sperm found in the vaginal samples taken from the victim. Mr. Verett concluded that the odds are 1 in 681 that [petitioner] contributed the sperm found in the vaginal swab sample. Mr. Verett also concluded that the was nothing in his testing that would exclude [petitioner] as a possible donor. The State had Dr. Martin Tracey, a professor of biological sciences at Florida International University, independently examine the results from both the RFLP and PCR tests. Dr. Tracey concluded that combining the results of both tests, the odds of [petitioner **not**] being the donor of the male fraction of the vaginal swabs taken

> from the victim are one in a million for the combined set of tests.

Resp. Exh. D at 3-7, 17-18 (Transcript citations and footnote omitted); Resp. Exh. A at 515-516. Review of the trial transcript demonstrates that this is a fair recitation of the State's evidence offered at trial.

EXHAUSTION OF REMEDIES

In order for a state prisoner to qualify for federal habeas corpus review under 28 U.S.C. § 2254, he must have first fully exhausted all available state remedies for each ground he presents to the federal court. 28 U.S.C. § 2254(b)(1)(A), (c); Coleman v. Thompson, 501 U.S. 722, 731 (1991); Sloan v. Delo, 54 F.3d 1371, 1381 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996). Respondent concedes that petitioner has exhausted his state remedies on grounds 1-3 by presenting each of the claims to the Missouri appellate court.[1]

Exhaustion of remedies may also occur in those instances in which there is no currently available, non-futile state remedy for petitioner to pursue. Coleman, 501 U.S. at 731, 752; Sloan, 54 F.3d at 1381. From the record it is clear that grounds 4 and 5 were not presented to the Missouri courts on direct review and were not presented in a timely Rule 29.15 motion for post-conviction relief. Resp. Exh. C; Petition (Doc. No. 4). The time limits of Rule 29.15 preclude a current motion for post-conviction relief. Mo. Sup. Ct. R. 29.15(b).

Petitioner has provided this court with his "Motion to Recall the Mandate" recently filed with the Missouri Court of Appeals. While not a model of clarity, review of this motion confirms that petitioner has failed to specifically allege his federal habeas

[1]Respondent has not filed a response to grounds 4 and 5 which were first raised in petitioner's supplemental pleadings (Doc. No. 11), although it appears from the pleading that petitioner served the Attorney General with a copy. However, grounds 4 and 5 are readily subject to disposition on the record before this court.

grounds 4 and 5 in this motion. Further, a motion to recall the mandate would not be an appropriate and available procedure for grounds 4 and 5. A motion to recall the mandate is not available for claims, such as these, that could have been raised on direct appeal or in a motion for post-conviction relief, but were not. Hall v. Delo, 41 F.3d 1248, 1250 (8th Cir. 1994); Kennedy v. Delo, 959 F.2d 112, 115-116 (8th Cir.), cert. denied, 506 U.S. 857 (1992); Williams v. Wyrick, 763 F.2d 363, 365 (8th Cir. 1985); State v. Teter, 747 S.W.2d 307, 308 (Mo. App. 1988).

> In Missouri, a motion to recall the mandate is proper only when a state prisoner alleges that his appellate counsel was ineffective or argues that the appellate court's opinion directly conflicts with a decision of the United States Supreme Court.

Hall, 41 F.3d at 1250 (quoting Jones v. Jerrison, 20 F.3d 849, 856 (8th Cir. 1994)). A motion to recall the mandate is not an appropriate vehicle to raise the claim of the ineffective assistance of trial counsel. Jolly v. Gammon, 28 F.3d 51, 54 (8th Cir.), cert. denied, 513 U.S. 983 (1994).

Ground 4 should have been presented in a post-conviction relief proceeding and ground 5 on direct review. However, neither procedure is now available to petitioner for these claims. Thus, the court must conclude that petitioner has exhausted grounds 4 and 5 in that there are no currently available, non-futile state remedies available to petitioner. However, as discussed below, petitioner's failure to present these claims to the state courts results in a procedural bar to habeas corpus review, unless petitioner can overcome the bar.

STANDARD OF REVIEW ON THE MERITS

This court may not grant an application for a writ of habeas corpus to a person in custody pursuant to a judgment of a Missouri state court unless the adjudication of the claim by the state court

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

> established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C.§ 2254(d). "A state court's decision is contrary to clearly established law 'if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case.'" Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999), cert. denied, 121 S. Ct. 204 (2000) (quoting Richardson v. Bowersox, 188 F.3d 973, 977-78 (8th Cir 1999), cert. denied, 120 S. Ct. 1971 (2000)). The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409-10 (2000) (plurality opinion); Richardson, 188 F.3d at 978 (a state court's decision is an "unreasonable application" if, when evaluated objectively and on the merits, it resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent). Mere disagreement with the state court's conclusion is not enough to warrant relief. Richardson, 188 F.3d at 978.

GROUNDS 1 AND 2

Petitioner challenges the sufficiency of the evidence to support the finding that he was the source of the DNA found at the crime scene and the finding that he caused the victim's death after deliberation. In considering a claim that the evidence was insufficient to support a conviction, this court must view the evidence in the light most favorable to the prosecution. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The court must further assume that the trier of fact resolved any conflicts in the evidence in favor of the prosecution. Id. at 326. Relief may only be granted if "no rational trier of fact could have found proof of

guilt beyond a reasonable doubt." Id. at 324; Campbell v. Norris, 146 F.3d 606, 608 (8th Cir. 1998), cert. denied, 525 U.S. 1150 (1999).

Petitioner claims that the evidence was insufficient to establish that he was the source of the DNA found at the crime scene. Contrary to petitioner's claim, the evidence was sufficient for a reasonable trier of fact to conclude that he was the source of the DNA.

As recited above, using the product rule approved by the Missouri Supreme Court in State v. Kinder, 942 S.W.2d 313, 327 (Mo. 1996) (en banc), cert. denied, 522 U.S. 854 (1997), the state presented evidence that the odds were 4,000,000:1 that the evidentiary DNA profiles were in fact contributed by the petitioner. Resp. Exh. A at 406. Other statistical analyses, such as the 95% confidence interval and the modified ceiling principle, still showed impressive probabilities that petitioner contributed the evidentiary DNA profiles. Id. at 406-09. There was additional evidence that the probability of randomly picking an individual with no connection to the crime but who matched the DNA test results was one in a million. Id. at 515-16.

The trier of fact not only had the DNA results and evidence regarding the statistical importance of the results, but also had other circumstantial evidence suggesting that petitioner was the source of the DNA found at the crime scene. Petitioner was observed at the crime scene, outside the victim's door, very early on the day that the victim was found murdered after he had been banned from the premises. Id. at 173-74, 206-07. He was repeatedly observed throughout the morning on the premises with a television identified as belonging to the victim, as well as with trash bags containing unidentified objects. Id. at 219, 227, 269-71. He sold a sewing machine belonging to the victim before the body of the victim was discovered. Id. at 289-96. He admitted to police that he had been inside the victim's apartment on the day the victim's body was discovered. Id. at 318.

The purpose of habeas corpus review is not to independently weigh the evidence, to assess credibility, to resolve conflicts in the evidence, or to determine if the court would have reached the same result as the trier of fact. Jackson, 443 U.S. at 318-19. This court may only grant relief if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 324. There was ample evidence to support petitioner's conviction as the perpetrator.

Petitioner also contends that there was insufficient evidence to support the finding that he caused the victim's death after deliberation. Under Missouri law, "deliberation" for purposes of first degree murder means cool reflection upon the victim's death for some amount of time, no matter how brief. State v. Rousan, 961 S.W.2d 831, 841 (Mo.), cert. denied, 524 U.S. 961 (1998). The state presented evidence at trial that it would take at least three minutes, possibly four minutes, of constant pressure on a victim's neck to cause death, and that the discontinuation of pressure at any time up to three minutes would likely result in the recovery of the victim. Resp. Exh. A at 138-39, 150-51, 154. Further, at some point, the victim is rendered unconscious, but the assailant must continue squeezing the neck for some period of time for death to occur. Id. at 138-39. This is sufficient evidence that the assailant had the opportunity to contemplate his actions and even prevent the death of his victim.

Further, to the extent that petitioner may be arguing that the evidence was insufficient to establish that he murdered the victim with deliberation, this claim is also without merit. The evidence established that the murder occurred at the time of or in close temporal proximity to the rape. Id. at 146, 154. The court has already considered petitioner's challenge to the sufficiency of the DNA evidence and concluded that the evidence was sufficient for a rational trier of fact to have found him guilty of forcible rape. A rational trier of fact could draw the reasonable inference that petitioner, having committed the rape, also committed the murder.

Consequently, there is sufficient evidence for a rational trier of fact to conclude that petitioner acted with deliberation in causing the death of his victim.

Accordingly, grounds 1 and 2 should be denied.

GROUND 3

Petitioner next contends that the trial court erred in admitting the DNA evidence because the state failed to establish a chain of custody. The admissibility of evidence is generally a matter of state law and will rarely support federal habeas corpus relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Bounds v. Delo, 151 F.3d 1116, 1118 (8th Cir. 1998); Scott v. Jones, 915 F.2d 1188, 1190 (8th Cir. 1990), cert. denied, 499 U.S. 978 (1991) (chain of custody issues are ones of state law and are rarely the basis of constitutional error). When a claim regarding the admissibility of evidence is presented in a federal habeas proceeding, our review is limited to determining whether the petitioner's constitutional rights have been violated. Rainer v. Department of Corrections, 914 F. 2d 1067, 1072 (8th Cir. 1990), cert. denied, 489 U.S. 1099 (1991). The issue for this court is not whether the trial court erred in admitting the evidence, but whether the admission resulted in a trial so fundamentally unfair as to deny petitioner due process of law. Id., 914 F.2d at 1072; Carter v. Armontrout, 929 F.2d 1294, 1296 (8th Cir. 1991). The court must look at the totality of the facts in the case and analyze the fairness of the trial. Rainer, 914 F.2d at 1072. To justify a grant of habeas relief, the error must be "so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford [petitioner] the fundamental fairness which is the essence of due process." Rainer, 914 F.2d at 1072 (quoting Mercer v. Armontrout, 844 F.2d 582, 587 (8th Cir.), cert. denied, 488 U.S. 900 (1988) (internal quotation marks omitted).

Under Missouri law, the trial court has broad discretion in admitting evidence and it need only be satisfied as to the identity of the exhibits and that the exhibits were in the same condition when tested as when they were obtained. State v. Link, 25 S.W.3d 136, 146 (Mo.) (en banc), cert. denied, 121 S. Ct. 634 (2000). Proof of a chain of custody under Missouri law does not require proof that eliminates all possibility that the evidence has been disturbed. Id. In fact, the trial court may assume, absent a showing of bad faith, ill will, or proof, that officials having the care and custody of exhibits properly discharged their duties and that no tampering occurred. Id.

The state did establish steps in the chain of custody. Resp. Exh. A at 342-43, 347, 349, 351-53, 375, 378-79, 385, 480-82. Defense counsel did not object to the admission of the evidence based upon the absence of a chain of custody. Consequently, the Missouri Court of Appeals reviewed the admission for plain error and found none. See Resp. Exh. E. Petitioner does not even suggest, much less demonstrate, that there was an actual flaw in the chain of custody sufficient to have denied him a fundamentally fair trial. Petitioner suggests no reason to believe that the state could not have presented more rigorous evidence of the chain of custody if called upon to do so by the court or defense counsel. Cf. Pryor v. Norris, 103 F.3d 710,713 (8th Cir. 1997) (no prejudice resulting from trial counsel's failure to object to evidence based upon the chain of custody where there was no reason to believe that the prosecution could not have met its burden). Petitioner does not demonstrate that his trial was in fact fundamentally unfair. Carter v. Armontrout, 929 F.2d 1294 (8th Cir. 1991) (admitting evidence without requiring a chain of custody did not support habeas relief absent a showing that the admission deprived petitioner of a fair trial). Consequently, given the evidence of a chain of custody as presented in the record, and the failure of petitioner to demonstrate that admission of the evidence in light of the chain of custody presented was so grossly or conspicuously

prejudicial as to deny petitioner a fair trial, this ground should be denied.

GROUNDS 4 AND 5

Petitioner has failed to present grounds 4 and 5 to the Missouri state courts for their review and determination. As discussed above, there are no currently available, non-futile state remedies under which petitioner may assert these claims. His failure to so present these claims erects a procedural bar to consideration of these claims on the merits unless petitioner can demonstrate cause for his default and actual prejudice resulting therefrom. Coleman, 501 U.S. at 735 n.1, 750; Murray v. Carrier, 477 U.S. 478, 485 (1986); Wainwright v. Sykes, 433 U.S. 72, 81, 87 (1977).

Even if petitioner cannot demonstrate cause and prejudice, he may nonetheless surmount the procedural bar by demonstrating that failure to consider the claim would result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750; Murray, 477 U.S. at 496. Such a miscarriage of justice would exist if petitioner made a "colorable showing of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); Murray, 477 U.S. at 496; Weeks v. Bowersox, 119 F.3d 1342, 1350 (8th Cir. 1997), cert. denied, 522 U.S. 1093 (1998) (to fit within the fundamental miscarriage of justice exception to procedural bar, petitioner must make a showing of actual innocence).

To make a gateway showing of actual innocence, petitioner must present reliable evidence not presented at trial and must show that more likely than not no reasonable juror would have convicted him in light of the new evidence. Schlup v. Delo, 513 U.S. 298, 324, 329 (1995); Weeks, 119 F.3d at 1351.

Petitioner fails to demonstrate cause for his procedural default. In his petition, he claims that he is untrained in the law and did not know the procedures. He further states that his

appellate counsel never told him that he could file a Rule 29.15 motion.[2]

Legally sufficient cause for a procedural default must be based upon an objective factor, external to the petitioner and his case, which impeded petitioner or his counsel from complying with the state's procedural rules. Murray, 477 U.S. at 488; Wainwright, 433 U.S. at 81. A lack of legal training or pro se status are not legally sufficient cause for a procedural default. Cornman v. Armontrout, 959 F.2d 727, 729 (8th Cir. 1992); Stanley v. Lockhart, 941 F.2d 707, 709-10 (8th Cir. 1991). The ineffective assistance of counsel is not cause for a procedural default under the circumstances of this case. Morris v. Norris, 83 F.3d 268 (8th Cir 1996) (procedural default not excused by attorney's failure to advise petitioner of exclusive state post-conviction remedy and its restrictive time limits). Further, even assuming petitioner's counsel failed to advise him of his rights under Rule 29.15, that does not demonstrate factual cause for the procedural default because the record demonstrates that the trial court advised petitioner of these rights. See n.2, supra.

Absent a showing of cause, this court need not reach the issue of prejudice. Zeitvogel v. Delo, 84 F.3d 276, 279 (8th Cir.), cert. denied, 519 U.S. 953 (1996); Oxford v. Delo, 59 F.3d 741, 748 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996). However, petitioner also fails to demonstrate actual prejudice resulting from the default. To establish actual prejudice, petitioner must show that the errors of which he complains worked to his actual and substantial disadvantage, infecting his trial with error of constitutional dimension. Murray, 477 U.S. at 494; Ivy v. Caspari, 173 F.3d 1136, 1141 (8th Cir. 1999).

With respect to ground 4, petitioner's post-conviction custodial placement in a state penal facility, as opposed to a

[2]The court notes that petitioner was advised of his Rule 29.15 rights by the Circuit Court at sentencing. Resp. Exh. B at 244, 249.

county jail, fails to constitutionally impugn his criminal trial and conviction and the fundamental fairness thereof. Further, to the extent that petitioner claims a violation of state constitutional or statutory law, such claims are not cognizable in this proceeding. 28 U.S.C. § 2254(a); Weeks v. Bowersox, 119 F.3d at 1349 (federal habeas corpus review is only available to those in custody in violation of the federal constitution or laws). Finally, petitioner fails to identify the specific federal constitutional provision or law that guarantees his placement in a county jail as opposed to a state penal facility upon his lawful conviction for a combination of felonies and a misdemeanor.

With respect to ground 5, petitioner fails to demonstrate any actual prejudice flowing from trial counsel's failure to object to the admission of the DNA evidence based upon the chain of custody. As discussed above, petitioner presents no factual reason to believe that such an objection was well taken or that the state could not have met its burden had the objection been made. There is no suggestion from the record that the trial court would have sustained such an objection. Pryor, 103 F.3d at 713 (no prejudice from counsel's failure to object on basis of chain of custody where there is no reason to believe that the prosecution would have failed to meet its burden if an objection had been timely made).

Finally, petitioner fails to suggest, much less demonstrate, his actual innocence to excuse the procedural bar. Accordingly, grounds 4 and 5 are procedurally barred and should be denied.

RECOMMENDATION

For the above mentioned reasons, it is the recommendation of the undersigned United States Magistrate Judge that the petition of Robert Hamilton for a writ of habeas corpus be dismissed with prejudice.

The parties are advised that they have ten days (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may result in the waiver of the right to appeal issues of fact.

UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of December, 2001.